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No. 95-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court applying heightened scrutiny to restrictions on speech—here, regulations limiting the rates that cable operators may charge for programming—must defer to factual determinations and assumptions made by an administrative agency so long as they are not "arbitrary and capricious."

PARTIES, INTERVENORS, AND AMICI TO THE PROCEEDINGS

Petitioner is National Cable Television Association, Inc. A separate petition for writ of certiorari is being filed by the Time Warner Entertainment Company, L.P. Other parties, intervenors, and amici in the proceedings below were:

Cable Telecommuncations Association
Comcast Cable Communications, Inc.
Wometco Cable Corp.
Harron Communications Corp.
Horizon Cable I, L.P.
C-TEC Cable Systems Inc.
Armstrong Holdings, Inc.
Cox Cable Communications, Inc.
Newhouse Broadcasting Corp.
Cablevision Industries Corp.
Benchmark Communications
Continental Cablevision, Inc.
Century Communications Corp.
Blade Communications, Inc.
Columbia Associates, L.P.
Daniels Cablevision, Inc.
Greater Media, Inc.
McDonald Investment Company, Inc.
Prime Cable Corp.
TeleCable Corporation
United Video Cablevision, Inc.
Western Communications
Falcon Holding Group, L.P.
Coalition of Small System Operators
Douglas Communications Corp. II
City of Austin, Texas
Attorney General of the State of Connecticut
Consumer Federation of America
Bell Atlantic
GTE Service Corp.
BellSouth Telecommunications, Inc.
NYNEX Corporation
DirecTV, Inc.

Liberty Cable Co., Inc.
National Association of Telecommunications Officers and Advisors
Federal Communications Commission
United States of America

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PETITION FOR A WRIT OF CERTIORARI

This case involves a First Amendment challenge to the regime of rate regulation imposed by the federal government on virtually all cable television systems in the United States. The Federal Communications Commission, presuming that any cable system without a direct cable competitor was charging supracompetitive prices, ordered all such systems to reduce their rates by 17 percent. Despite the potential effects of such reductions on the quantity and quality of speech, the court of appeals upheld the order, applying standards of review applicable to administrative orders generally rather than heightened standards applicable to orders implicating speech. In particular, the court emphasized that its review of agency ratemaking should be "particularly deferential" and that its role was

simply to determine whether the orders were "arbitrary and capricious." [1]

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a) are reported at 56 F.3d 151. The relevant orders of the Federal Communications Commission are reported at 8 FCC Rcd 5631, 9 FCC Rcd 1164, 8 FCC Rcd 8444, 9 FCC Rcd 4119, and 9 FCC Rcd 4529.[2]

JURISDICTION

The court of appeals entered judgment on June 6, 1995. Pet. App. 1a. A timely petition for rehearing was denied on August 17, 1995. Pet. App. 100a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Relevant provisions of the Cable Television Consumer Protection and Competition Act of 1992 are reprinted at Pet. App. 104a.

STATEMENT

I. Background.

A. The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 ("1984 Act") was the first comprehensive attempt by the federal government to regulate cable television systems. Prior to the Act, "there was no Federal policy for cable television." *See* S. Rep. 92, 102d Cong., 1st Sess. 2 (1991) (*Senate Report*).

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[1] Pursuant to Rule 29.6 of the Rules of this Court, petitioner National Cable Television Association, Inc. states that it has no parent company and no subsidiaries.

[2] "Pet. App." refers to the appendix to the petition filed by Time Warner Entertainment Co. seeking review of the same judgment we challenge here. The voluminous orders of the Commission have been lodged with the Clerk. They are cited both by name and paragraph number and also by the pages from the Joint Appendix filed in the court of appeals.

Although local franchising authorities had previously exercised regulatory authority over cable systems, including (in many cases) the authority to regulate rates (*Rate Order* ¶ 6 [JA 239-40], the 1984 Act sought to reduce regulation in order to "benefit[] both consumers and industry participants alike." H.R. Rep. 628, 102d Cong., 2d Sess. 29 (1992) (*House Report*). *See also 1990 Report* (5 FCC Rcd 4962) ¶ 1 ("[t]he Cable Act was designed to promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems"). In particular, the 1984 Act permitted regulation of rates only for basic cable service, and only if a cable system was not subject to "effective competition."[3]

The 1984 Act broadly realized the congressional objectives of fostering growth in the cable industry and increasing benefits to subscribers. *1990 Report* ¶¶ 2-4; *Senate Report* 3. Not only did cable television become far more widely available,[4] but, with substantial increases in capital investment by cable operators ($1.7 billion per year by 1989, up 55 percent since 1984 (*1990 Report* ¶ 3)), the average channel capacity of cable systems increased from 24 in 1985 to 37 in 1991. Kagan Media Index, Jan. 22,

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[3] Applying this standard, the Commission found that the rates charged by a cable system were constrained, and that "effective competition" was present, whenever subscribers to a system had available at least three over-the-air stations--approximately 97 percent of cable systems. *See Senate Report* 4. In 1991, the FCC revised its definition of "effective competition," *1991 Effective Competition Order*, 6 FCC Rcd 4545 (1991), concluding that a cable system was subject to effective competition, *i.e.*, unable to exercise market power, if its subscribers could receive six unduplicated over-the-air television stations (or if 50% of the homes it passed were also passed by another multichannel provider that had achieved 10% penetration). *Id.* ¶ 1.

[4] The number of homes in which cable was available increased from 60.5 million to 89.4 million (more than 95% of homes) between 1984 and 1992, Kagan Media Index, June 20, 1994, at 14, and cable penetration increased from 37 percent of all television households in January 1985 to approximately 61 percent by June 1992. *House Report* 29; *see 1990 Report* ¶ 2.

1992, at 2. With this greatly increased capacity came correspondingly rapid growth in the cable programming services provided to subscribers. *Senate Report* 3 ("Programming choices have also grown about 50 percent since the 1984 Act was passed, with many more offerings now being planned"). Cable programming networks, which had spent about $340 million on their programming in 1984, spent about $1.5 billion by 1991. *House Report* 31. And licensing fees paid by cable operators to programmers increased from $165 million in 1985 to $1.5 billion in 1992. Kagan Media Index, June 20, 1994, at 14.

B. As the cable industry grew, however, concerns were raised that some cable systems might have imposed undue rate increases since deregulation. As a general matter, increases had been expected in the wake of a federal policy designed to counter years of unduly restrictive municipal regulation. *See 1990 Report* ¶ 6 (some rate adjustments had been "anticipated consequences" of deregulation). But, by the end of the 1980s, the federal government began to study the question whether, and to what extent, particular cable operators possessed market power and were exercising it to charge monopoly prices to consumers—whether because of a paucity of competing broadcast stations, the costs of building a second cable system in a franchise area, an insufficient number of non-cable multichannel providers of video programming, or other factors.[5]

In 1989, the General Accounting Office reported on its survey of cable systems' rates since deregulation. *See Senate Report* 4-6 (quoting GAO report). Based on information received from about 15 percent of the Nation's cable systems, the GAO concluded that, between 1986 and 1988, basic and non-basic tier rates had in-

[5] Multichannel video programming distributors include satellite master antenna television systems (SMATV), multichannel multipoint distribution systems (MMDS), television receive-only satellite service (TVRO), direct broadcast satellite systems (DBS), and video dialtone systems (VDT). *See* 47 C.F.R. § 76.905(d).

creased, respectively, by 29 percent and 26 percent—while, during the same period, the average number of channels provided on those tiers had increased, respectively, by 25 percent and 19 percent. *Id.* at 5. The price per channel for basic service thus had increased from 47 to 48 cents per month—a rate well below inflation. *Id.*

The following year, the FCC used the GAO survey to make an independent report to Congress about whether cable systems' rate increases were unreasonable. Lacking cost data, the FCC said that it could not reach any conclusion about whether increases in basic-service rates reflected market power. *1990 Report* ¶ 32; *id.* ¶ 34 ("we cannot conclude that the price increases reflect a pattern of anticompetitive behavior or a definitive degree of market power by the cable industry"), ¶ 13(3) ("the rise in rates alone, without cost data, is not conclusive on the question of market power"). But, taking the industry as a whole, the FCC pointed out that there was reason to question whether there had been unreasonable rate increases. *Id.* ¶ 33 ("the average price of basic cable service when measured on a per-channel basis has increased at a rate *significantly lower than inflation during the past three years*") (emphasis added). Even for the systems that had raised rates more significantly, the FCC noted that those increases might have been a "one-shot 'correction' to rates that had been constrained below reasonable levels before deregulation." *Id.* ¶ 34. Nonetheless, the FCC reported that a limited number of cable systems had increased rates "substantially more than the average" and that those "limited individual cases" were largely responsible for the perception that the cable industry as a whole wielded market power and had unduly raised rates. *Id.*

II. The 1992 Cable Act.

The House committee in 1992—whose bill, in relevant part, was substantially enacted by Congress—likewise took the view that some, but not most, cable operators had abused their deregulated status. *House Report* 29, 31 (rate increases "in some instances" had been unrea-

sonable). Specifically, the committee found "that rate increases imposed by *some cable operators* are not justified economically and that *a minority of cable operators* have abused their deregulated status" and "unreasonably raised the[ir] rates." *Id.* at 33 (emphasis added); *see id.* at 86 ("While most cable operators have been responsible about rate increases in this deregulated environment, a *minority* of cable operators have abused their deregulated status and have unreasonably raised subscribers' rates. In *some* cases brought to the attention of the Committee, those rate increases have been egregious.") (emphasis added). The committee expressed the need to "protect consumers from unreasonable behavior by the 'renegades' in the cable industry." *Id.* at 30.[6]

The 1992 Cable Act, however, made most cable systems at least potentially subject to rate regulation. Exempted from regulation were cable systems subject to "effective competition," as defined by the Act. *See* § 543(b)(2), (c)(1). Abandoning the use of broadcast television signals as a competitive yardstick, Congress delineated three categories of cable systems deemed subject to effective competition and therefore exempt from rate regulation: low-penetration systems, overbuild systems, and municipal systems.[7] The rates of those systems

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[6] *See also* 138 Cong. Rec. S14, 224 (daily ed. Sept. 21, 1992) (Sen. Inouye, sponsor) (statute contains a "bad actor provision" so that "the FCC may regulate, on a case-by-case basis, rates for tiers of programming other than basic"); 138 Cong. Rec. H8,671 (daily ed. Sept. 17, 1992) (Rep. Harris) (statute "provides a means to rein in renegade cable operators from charging excessive rates in the upper tiers of cable service"); 138 Cong. Rec. S561 (daily ed. Jan. 29, 1992) (Sen. Inouye, sponsor) ("S.12 includes what could be called a 'bad actor' provision").

[7] A low-penetration system is defined as a cable system serving fewer than 30 percent of the households in a franchise area. An overbuild system is defined as a cable system where a comparable unaffiliated multichannel service is available to at least 50 percent of the households in a franchise area and at least 15 percent of the franchise area's households subscribe to competing services. A municipal system is defined as a cable system where the franchising

may not be regulated at either the federal or local level. § 543(a).

The remainder of cable systems (the large majority) were made subject to a two-part scheme of regulation. *Compare* § 543(b) *with* § 543(c). One part applies to "basic" service, which is the tier of service that all subscribers are required to purchase and which must include all local broadcast stations and local public, educational, and government access (PEG) channels. § 543(b)(7). Local franchising authorities generally oversee the rates for basic service based on standards set by the Commission. Congress directed the Commission to promulgate standards—within a deadline of 180 days—to ensure that a system's rates for basic service were "reasonable," and it expressly stated that the goal of the regulations should be to protect consumers from "rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition." § 543(b)(1); H.R. Conf. Rep. 862, 102d Cong., 2d Sess. 62 (1992) (*Conference Report*).[8]

The statute separately regulates "cable programming service" (CPS or "non-basic" service), which consists of all other "tiers" of cable service, *i.e.*, all programming other than what is included on the basic tier (which is regulated under the scheme described above) or offered on a per channel or per program basis ("a la carte" programming, which is not regulated under the Act). Congress did not set an explicit goal for CPS rates, as it did for basic rates. Rather, it simply directed the Commission to determine "in individual cases" whether a system's non-basic rates are "unreasonable," and then mandated

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authority itself offers multichannel service to at least 50 percent of a franchise area's households. *See* § 543(*l*)(1)(A)-(C).

[8] The statute directs the FCC to consider, in addition to "the rates for cable systems, if any, that are subject to effective competition," various factors related to costs, revenues, and profits. § 543(b)(2)(C).

that the Commission consider a set of criteria quite different from those specified for basic rates. These criteria included "the rates for similarly situated cable systems offering comparable cable programming services," the history of CPS rates for that system, and the overall rates of the system, as well as the rates of systems subject to effective competition. § 543(c)(1), (2). Unlike with basic service, only the FCC, without participation by local governments, has authority to determine whether non-basic rates are excessive. § 543(c)(1).

III. Regulation of Rates by the Commission.

A. The Commission adopted its first *Rate Order* on April 1, 1993. Notwithstanding the separate statutory treatment of basic and non-basic tiers, the FCC decided at the outset that it was "preferable" to institute a regulatory framework that was "tier neutral," *i.e.*, to apply the same set of standards to basic rates and non-basic rates. *Rate Order* ¶ 396 [JA 483-84]. Accordingly, the Commission applied to both basic and non-basic tiers the standard set out in the statute to govern basic service: rates should not exceed what would be charged by a comparable system subject to effective competition.

To implement this standard, the Commission conducted a survey of the rates being charged, on September 30, 1992, by all of the systems subject to effective competition that it could identify (low-penetration, overbuild, and municipal systems) and a random sample of the systems not subject to effective competition.[9] Analyzing this data, the Commission found that, other factors being equal, systems subject to effective competition charged rates that, on average, were 9.4% lower than systems not subject to effective competition. *Id.* ¶ 14 n.29, ¶ 205 [JA 245-46,

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[9] Because most of the cable systems in the Nation are small (fewer than 5,000 subscribers), most of the systems in the Commission's sample were small. Small systems, however, serve fewer than 15% of cable subscribers in the Nation. *See* Economists Inc., *The Effect of "Competition" on Rates Differs for Large and Small Cable Systems* p. 1 (submitted to FCC, cited at *Second Reconsideration* Tech. App. 4301 n.63) [JA 1052].

368].[10] The Commission rounded up this "competitive differential" to 10% and then constructed a "benchmark" table for cable systems grouped according to the significant system characteristics. The Commission calculated the average per-channel rate for each such group and reduced that figure by 10% to approximate what would be charged by such a system if it were subject to effective competition. *Id.* ¶ 213 [JA 372].

The resulting rates established caps for basic and non-basic service offered by regulated systems. If a system had rates above the applicable benchmark, it had to reduce its rates to the benchmark or by 10%, whichever was the smaller reduction. *Id.* ¶ 218 [JA 374-75].[11] If a system's rates were either at or below its benchmark, the Commission deemed those rates to be "reasonable" ones. *Id.* ¶ 213 [JA 372]. Then, with these initial maximum rates in place, the Commission set limits, generally restricted to inflation, on the increases in price that a cable operator was to be allowed in the future. *Id.* ¶¶ 223-240 [JA 376-85].[12]

B. The implementation of the benchmark scheme—which went into effect on September 1, 1993—provoked an intense political response. Although the net effect was

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[10] Along with setting out its benchmark system, the Commission in the *Rate Order* made clear that a cable system could elect the "safety valve" of cost-of-service regulation for its rates and thereby use costs to justify rates above the benchmarks. But the Commission indicated that cost-of-service regulation should not be a primary means of regulating either the basic or CPS tier. *Rate Order* ¶ 392 [JA 479-80] ("applying cost-of-service regulation to thousands of cable systems would impose tremendous administrative burdens on regulatory authorities and cable operators").

[11] The Commission indicated that it would further study those systems whose rates were more than 10% above the benchmarks (the 10% reduction for such "outlier" systems might be viewed as a windfall for the "bad actors"). *Id.* ¶ 220 [JA 375].

[12] Shortly before the *Rate Order* was to become effective, the FCC ruled on, and largely rejected, a number of petitions for reconsideration, saying that it had disposed of "as many of the most pressing issues as possible." *See First Reconsideration* ¶ 2 [JA 759].

a rate reduction for the "typical" cable subscriber, the scheme did not produce a large across-the-board rollback for basic tier rates. Although the FCC had anticipated these effects, *see Cable Rules Will Raise Some Bills*, Wash. Post, Aug. 18, 1993, at A1, A9, members of Congress immediately put pressure on the Commission to order deeper rate cuts. On September 24, 1993, a letter from 130 members of Congress to the FCC Chairman questioned the "perverse result" of the regulations and proposed "that the FCC should adjust these regulations"; and a few days later all three Commissioners appeared before Congress. Communications Daily, Sept. 16, 1993, at 10; Sept. 27, 1993, at 8; Sept. 29, 1993, at 1. In November, 36 Senators wrote to the new Chairman "that the commission must take additional actions to reduce cable rates." *See Cable Industry Lobbies FCC, Saying Rate Cuts Would Threaten the Information Superhighway*, Wall St. J., Feb. 17, 1994, at A18; *Markey, At Odds with FCC, Plans Hearing on Cable Rates*, Boston Globe, Sept. 11, 1993, at 9 (Subcommittee Chairman "said he is confident that . . . [the new FCC Chairman] would push for new FCC regulations aimed at lowering cable rates").

The Commission then undertook a new industry survey and a thorough reconsideration of its regulations. On February 22, 1994, the Commission adopted, and on March 30 it released to the public, a new and substantially more onerous regulatory regime—the *Second Reconsideration* order. The Commission continued its tier-neutral regulation of basic and CPS rates, looking to "effective competition" as the guide to rate reductions for both services, but it made important changes, including two having dramatic effects.

First, the Commission brought *all* regulated systems under its determination that the rates of systems not subject to effective competition were excessive in the full amount of the competitive differential. In the *Rate Order*, the Commission had deemed benchmark rates reasonable, *i.e.*, reflective of rates charged by systems subject to effective competition, and so it did not require a cable system

with rates at or below the benchmarks to reduce its rates: "there is no reason to assume that its rates reflect undue market power even in the absence of effective competition." *Rate Order* ¶ 216 [JA 373-74]. Without any new evidence, however, the FCC now concluded that *all* cable systems not subject to effective competition must be charging monopoly prices (*Second Reconsideration* ¶¶ 15-16 [JA 880] ("in our view, a noncompetitive rate is not a 'reasonable' rate")), explaining that it had no "conclusive basis" to "assume" that even cable operators "whose rates, nonetheless, appear to be low (*i.e.*, at or below a benchmark)" were *not* exercising market power. *Id.* ¶ 16 [JA 880]. Even while conceding that it was largely operating in the dark (*id.* ¶ 107 [JA 917-18] ("[w]ithout more detailed information on the cost and demand conditions facing a particular cable operator, however, it is impossible to determine the amount by which that operator's revenues exceed its costs")), the Commission determined that the rates of all cable systems subject to regulation under the Act required reduction, immediately or over time.

Second, and even more strikingly, the Commission came up with a new calculation of the magnitude of the compelled rate reduction. Using the same data from the year before, the FCC revised its statistical calculation of the competitive differential and concluded that the differential was not 10% but in fact 17%. The Commission accordingly ordered all regulated cable systems to adopt a 17% rate reduction (immediately or, in certain cases, over time) to establish their initial maximum lawful rates, with future rates then constrained by limits on the increases allowed over those initial rates (based on inflation, certain "external cost" increases, and the number of channels).[13]

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[13] Cable systems generally were required either to reduce their rates immediately to 17 percent below 1992 rate levels or, if that reduction would drop rates below the new benchmarks, to reduce their rates to the benchmark but then refrain from taking inflation-

The Commission arrived at this figure in several steps. To begin with, the Commission concluded that it was free to assign different weights to the different categories of competitive systems, and to adjust the figures by "refining" its analysis of each category, based on its own perception of the "extent and nature of competition faced by each." *Id.* ¶ 91 [JA 912]. Then, following that method, the Commission decided to give no weight to the most numerous category (low-penetration systems), *see id.* ¶¶ 92-94 [JA 912-13]; *id.* ¶ 28 [JA 885], or to the dozen or so municipal systems. *Id.* ¶¶ 31, 103 [JA 886, 916]. Having narrowed its focus to the overbuild systems alone, which it said provided "the most informative data with regard to estimating reasonable rates," the Commission based its competitive differential of 12-13% on the rates charged during the *initial* stages of competition—rejecting the argument that the initial rates were actually below competitive levels (because of price wars) in favor of a theory that later rates were above competitive levels (because of collusion). Finally, for good measure, the Commission revised the differential upward to 16%, by narrowly defining the areas of actual competition, *id.* ¶¶ 29-30, 96-105, Tech. App. 4285 [JA 885-86, 913-17, 1036], and, based on its "expertise," upward again to 17%. *Id.* ¶ 105 [JA 917] ("we have selected 17% as the revised competitive differential").

The Commission acknowledged that there was no competitive differential at all for the large systems that serve more than 85% of the Nation. Nevertheless, the Commission chose not to limit its rate orders, but to apply the 17% differential to all systems, regardless of size. *Id.* ¶¶ 86-89 [JA 910-11]. The Commission again rested its action on a theory about collusion, this time suggesting that large systems subject to effective competition

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based increases until a 17% cut in real prices was effected over time. *Second Reconsideration* ¶¶ 110, 127, 131 [JA 919, 929-30, 933]. The Commission held out the possibility of some change in this regime for the latter group of systems if justified by future cost studies it promised to undertake. *Id.* ¶¶ 35, 36 [JA 888-89].

might be more effectively colluding than their smaller counterparts. *Id.*

IV. The Court of Appeals' Decision.

The court of appeals upheld the orders against a number of challenges based on the First Amendment. Although the court declined to apply strict scrutiny to the orders, Pet. App. 47a-53a, it did recognize that, as regulations aimed at the press, the orders were subject to heightened scrutiny. See Pet. App. 53a (citing *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994)). In applying that scrutiny, however, the court did not advert either to the burden imposed on the government to justify its restrictions or to the need of reviewing courts to exercise independent judgment in assessing those justifications. *See Turner*, 114 S.Ct. at 2470-71. Rather, at critical points, it deferred to assumptions made by the government, applying traditional standards of administrative review.

The opinion of Judge Randolph—ostensibly the opinion resolving First Amendment issues—first concluded that "[t]he government's interest in regulating cable rates is evident—protecting consumers from monopoly prices charged by cable operators who do not face effective competition." Pet. App. 53a. But, in rejecting arguments that the government had not shown an actual history of pervasive monopoly pricing, Judge Randolph relied almost exclusively on figures from the 1989 GAO study (*see* pages 4-5 *supra*), which showed rate increases greater than inflation on an absolute basis but smaller than inflation on a per-channel basis. Pet. App. 54a-55a. The opinion did not mention that the Commission, the year after the GAO study, had stated that, based on the data in the study, "we cannot conclude that the price increases reflect a pattern of anticompetitive behavior or a definitive degree of market power by the cable industry." *1990 Report* ¶ 34. Without requiring any further explanation by the Commission, the court nonetheless put primary weight on that same information as the basis for accepting that pervasive monopoly pricing exists.

The opinion of Judge Randolph then dismissed several arguments about the scope of regulation—in particular, that it vastly overstated the overall competitive differential by relying on data from periods of initial competition and that it applied the 17% figure to large systems despite data showing no differential at all for those systems—solely on the basis of the analysis in Judge Ginsburg's opinion. Pet. App. 56a n.12. That opinion, however, said explicitly that it was subjecting the rate orders to nothing more than the usual highly deferential review. Judge Ginsburg thus stated that, with respect to each of the points in dispute, the issue to be resolved is simply "whether the agency has " 'examine[d] the relevant data and articulated a [. . .] "rational connection between the facts found and the choice made." ' " Pet. App. 7a (quoting *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). Indeed, Judge Ginsburg went on to declare that "[b]ecause agency ratemaking is far from an exact science and involves 'policy determinations in which the agency is acknowledged to have expertise,' our review thereof is particularly deferential." Pet. App. 7a (quoting *United States v. FCC*, 707 F.2d 610, 618 (D.C.Cir. 1983)).

Judge Ginsburg then applied these traditional standards in rejecting arguments that the regulations imposed far greater restrictions on speech than the data of the Commission itself would justify. Thus, for example, the opinion recognized the fact that "the competitive differential for overbuilt systems falls over time"—to a figure far below the 12%-13% differential used by the Commission as the starting point for its mandatory reductions—but it nonetheless concluded that the decision to rely on the initial, much higher figure was not arbitrary and capricious. Pet. App. 13a-16a. In so doing, it held that the Commission could choose to impose the more sweeping cuts based on a "hypothesis" that the lessening differential "*could* be due to the emergence of 'parallel or coordinated pricing.' " Pet. App. 14a (emphasis added). It found that theory "not so implausible that reliance upon it is unreasonable . . . ." Pet. App. 15a.

Judge Ginsburg likewise acknowledged that there was no competitive differential at all with respect to systems with more than 5,000 subscribers. Yet, his opinion again concluded that, notwithstanding this fact, it was not "arbitrary and capricious" for the Commission to order large systems to reduce their rates by 17% as well. Pet. App. 17a. According to the opinion, the Commission was entitled to assume that the rates of all large systems were supracompetitive because the systems themselves had not proved that they lack market power. Pet. App. 17a. In the absence of such proof, Judge Ginsburg reasoned, the Commission could, once again, proceed to regulate on the basis of a hypothesis that collusion had raised the rates of overbuild systems above competitive levels.

REASONS FOR GRANTING THE WRIT

This case—which involves the regulation of rates for virtually all cable systems throughout the United States —presents an important, unsettled question of First Amendment law: what is the proper role of a court in reviewing the grounds asserted to justify restrictions on speech? Although this Court has said that the government bears the burden of justifying restrictions on speech, and emphasized the need for courts to make an independent review of the record said to support such restrictions, it has also, in certain contexts, admonished courts to remain deferential in their review. *See* pages 17-19 *infra*. Faced with these somewhat conflicting directives, some courts have concluded that, to sustain regulation of speech, they need to find only that the judgment of the officials imposing the regulation was "reasonable," and not that a genuine problem requiring the particular regulation in fact existed. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994), *cert. granted*, 115 S. Ct. 1821 (1995) (No. 94-1140). The court in this case stopped short of even that modest threshold, upholding an unprecedented regime of rate regulation largely on the basis of a determination that the asserted grounds were not "arbitrary and capricious."

The issue of what "heightened scrutiny" actually means is one of widespread importance. As a result of decisions of this Court, heightened (but not strict) scrutiny is now the standard applied to most kinds of restrictions on speech: regulation of conduct with an incidental effect on speech, regulation of the time, place and manner of speech, regulation of commercial speech, and content-neutral regulation of speech. *See* page 24 *infra*. Although each of the various tests speaks of the need for government to demonstrate a substantial interest advanced by its regulation, the boundaries of First Amendment protection ultimately will depend upon the extent to which regulators are allowed to decide for themselves on the need to restrict speech—that is, the extent to which courts will defer to their judgments. And, in this particular case, it will determine whether the government can do something that it has not done in some 200 years of constitutional history: establish sweeping limits on what members of the press may charge for their speech.

We also believe that the decision below is seriously flawed. Rather than require the Commission to establish that the vast majority of cable systems were in fact engaged in monopoly pricing, or at least to demonstrate that data contradicting that theory were in fact unreliable, the court of appeals repeatedly indicated that it was applying nothing more stringent than traditional, garden-variety standards of administrative review. Under any proper standard of "heightened" review, however, it is not enough for a court simply to find that the actions of an administrative agency are not "arbitrary and capricious" or that (as the court below said at one critical juncture) a pivotal governmental theory was "not so implausible that reliance upon it is unreasonable . . . ." Pet. App. 15a. To extend that kind of deference to the very officials imposing restrictions on speech in the first place markedly, and improperly, narrows the protections afforded to speech under the First Amendment.

I. THIS CASE PRESENTS AN IMPORTANT ISSUE REGARDING JUDICIAL REVIEW OF RESTRICTIONS ON FIRST AMENDMENT ACTIVITIES.

A. The various tests for heightened scrutiny require regulations affecting speech to serve an important governmental interest and to directly and materially advance that interest. *See, e.g., Edenfield v. Fane*, 113 S.Ct. 1792, 1798-99 (1993); *United States v. O'Brien*, 391 U.S. 367 (1968).[14] In addition, it is essential that the regulation not burden substantially more speech than necessary to promote the asserted interest. *See Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). The Court has made clear that this standard is intended to protect speech against government overreaching: rather than allow the government to regulate freely in furtherance of any legitimate interest, it "require[s] the government goal to be substantial, and the cost to be carefully calculated." *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989) (*SUNY*).

The worth of these elevated standards is considerably diminished, however, if government may largely decide for itself whether they are met. The familiar rational basis test, for example, adopts, as a starting point, a strong presumption that the government is exercising its powers lawfully: as a result, a regulation must be upheld "if there is any reasonably conceivable state of facts" to justify it. *FCC v. Beach Communications, Inc.*, 113 S.Ct. 2096, 2101 (1993). But heightened scrutiny, at least in theory, is not so lax. Given that heightened scrutiny is invoked only when the government is trenching upon areas of constitutional freedom, the standard does not, and should not, employ a wide-ranging presumption that regulations are valid. This Court has thus stated unequivocally that "the State *bears the burden of justifying*

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[14] In this petition we address only the issue of the proper standard for heightened scrutiny. With respect to the issues of strict scrutiny and agency construction of the Act itself, we rely on the petition filed by Time Warner Entertainment Co. L.P.

its restrictions." *SUNY*, 492 U.S. at 480 (emphasis added).

The "burden" assigned to the government alters the nature of constitutional scrutiny in several critical respects. To begin with, it means that the government cannot simply rely on an interest that is substantial "in the abstract." *See Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445, 2470 (1994) (plurality opinion). Instead, it is the job of government to "*demonstrate* that the recited harms are real, not merely conjectural, and that the regulation will *in fact* alleviate these harms in a direct and material way." *Id.* (emphasis added). Moreover, even if the government satisfies that initial burden, it has an additional hurdle to clear: it also must "*bear*[] *the burden of showing* that the remedy it has adopted does not 'burden substantially more speech than is necessary to further the government's legitimate interests.' " *Id.* (quoting *Ward*, 491 U.S. at 799) (emphasis added).

Reviewing courts, for their part, are not simply left to inquire whether the government acted without any conceivable basis: rather, they must exercise "independent judgment" in deciding whether the government has actually met its burden of supporting the restrictions on speech. *See Turner*, 114 S. Ct. at 2471 (plurality opinion). Indeed, this Court has recently said that, in cases implicating First Amendment rights, courts have "*a constitutional duty* to conduct an independent examination of the record as a whole . . . ." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S.Ct. 2338, 2344 (1995) (emphasis added). Absent that duty, of course, a government imposing restrictions on speech—merely by making self-serving findings or adopting theories tilting towards regulation—would be able to confer on itself the power to infringe rights otherwise protected against government interference. The Court thus noted in *Hurley* that the obligation to exercise independent judgment "rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace," observing that a court must "decide

for [itself] whether a given course of conduct falls on the near or far side of the line of constitutional protection." 115 S.Ct. at 2344.

These two basic principles—that the government bears the burden of justifying its restrictions and that reviewing courts must exercise independent judgment to see that the burden is met—would seem to leave little room for the sort of deference traditionally accorded to legislative or administrative officials. It is not surprising, therefore, that this Court has stated plainly that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978).[15] But the picture, unfortunately, is not so clear. At other times, the Court appears to have said just the opposite: that courts *should* give deference to the judgments made by legislators or administrators. *See Turner*, 114 S.Ct. 2470-71 (plurality opinion); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 569 (1990). *See also Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985). Thus, at least in the context of reviewing Congress' predictive judgments, the Court has stated that a reviewing court should determine only whether "Congress has drawn reasonable inferences based on substantial evidence." *Turner*, 114 S.Ct. at 2471 (plurality opinion). *See also Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341-42 (1986) (accepting "belief" of legislature as "reasonable").

The proper standard of review thus remains uncertain. Is a court to exercise truly independent judgment and decide whether the government has met its burden of showing that a problem requiring this degree of interference with speech *in fact* exists? Or is it merely to determine whether the judgments made by the government to

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[15] The Court noted, in fact, that, if deference did limit judicial inquiry, "the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." 435 U.S. at 844.

support its restrictions are *reasonable*? *See generally Concrete Pipe and Products, Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264 (1993) (discussing degrees of deference under different standards of review). In a case now before this Court, the First Circuit came down squarely on the side of the latter view, *44 Liquormart*, 39 F.3d at 7, declaring that the government need not convince a court that its basis for regulation in fact exists. The court thus held that the burden "is not correctness, it is reasonableness." *Id.*

We believe the standard adopted by the First Circuit leans too far in the direction of deference to government regulation, and too little in the direction of safeguarding freedom of speech. But the court of appeals in this case was, if anything, even more deferential. As we discuss in detail at pages 26-30 *infra*, the opinion of Judge Randolph, to the extent that it examined the asserted grounds for the regulations at all, simply accepted an assumption made by the Commission (that cable operators had pervasive market power) based on a study that the Commission itself, not very long before, had found inadequate to support that same assumption. Then, to make matters worse, the opinion of Judge Ginsburg—on which Judge Randolph relied to resolve the remaining First Amendment issues —expressly and unequivocally stated that it was applying nothing more than familiar standards of administrative review. Given that the subject was ratemaking, in fact, Judge Ginsburg announced that judicial review in this case would be "particularly deferential." Pet. App. 7a.

The result is that the called-for heightened scrutiny was not heightened at all. In reviewing agency regulations, of course, a court does *not* exercise independent judgment nor does it require the agency to bear the burden of convincing the court of the basis for its regulations. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual*, 463 U.S. 29, 42-43 (1983). Rather, reviewing courts require only that an agency "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and

the choice made.'" *Id.* at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). *See also Northwest Airlines v. U.S. Dept. of Transp.*, 15 F.3d 1112 (D.C. Cir. 1994). Indeed, agency regulations carry a presumption of validity. *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971); *Association of American Railroads v. ICC*, 978 F.2d 737 (D.C. Cir. 1992).

The court of appeals thus got matters quite backwards. To be meaningful, heightened scrutiny must require something more than a determination that the government—admittedly regulating in an area of constitutional delicacy—"might" have a valid reason for doing so. To allow the government to restrict speech on the basis of assumptions that are simply "reasonable" ultimately assigns the risk of error not to those seeking to restrict speech, but to those engaged in speech. Put another way, a standard amounting to no more than "reasonableness" embodies the view that it is better for government to *over*regulate in the area of speech than to *under*regulate. *See generally Addington v. Texas*, 441 U.S. 418 (1979) (burden of proof reflects views of society about where risk of error should fall). That notion seems flatly contrary to the most basic principles underlying the First Amendment. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (adopting constitutional standard to allow "breathing space" for First Amendment freedoms).[16]

The government cannot be expected, of course, to prove what is ultimately unprovable. But it must, at a minimum, do all that it reasonably can do to establish that a need for restrictions on speech in fact exists. After all, if the government attempted to regulate the rates of *one* cable system—on the ground that it was exercising market power and charging customers 17% more than a competitive rate—it would be obligated to provide evidence

[16] The need for close scrutiny was particularly necessary here, given that the Commission essentially revamped its regulatory scheme—imposing far deeper cuts on far more systems—in response to overt political pressure. *See* pages 9-10 *supra*.

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that the system in fact possessed market power and that systems without market power charged significantly less. Although it is often harder to prove broad propositions than narrow ones, it would nevertheless be odd to have a rule that, because the government is seeking to regulate the rates of *all* cable systems, it could meet its burden merely with assumptions deemed "plausible" or not "arbitrary and capricious." That approach would effectively subject sweeping, prophylactic rules to less scrutiny than restrictions grounded in actual misconduct. *See generally NAACP v. Button*, 371 U.S. 415, 438 (1963) ("[b]road prophylactic rules in the area of free expression are suspect").[17]

We believe, therefore, that it is not enough for the government to put forward "reasonable" grounds for regulating speech. Rather, a reviewing court, having due regard for the nature of available proof, should require that the government make out a "convincing case" for regulation. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 644 (1985). Under this standard, a court should *not* sustain regulation of speech just because it is able to find, applying customary standards of deference, that the government has satisfied ordinary standards of administrative review. If that were all that was required, it would effectively mean that the government could broadly regulate the price for speech with no more basis than it needs to regulate the price for railroad service or for natural gas.

B. The issue raised here is of importance, not just to cable systems whose rates are now controlled by the federal government, but to any speakers affected by a variety of government restrictions on speech. Here, the

[17] As we discuss, *see* pages 27-30 *infra*, the government here twice relied on assumptions about "collusion" between competing systems, even though it made no effort whatsoever to obtain available cost data that would tend either to substantiate or to disprove its theory. And it likewise acted upon an assumption of pervasive monopoly pricing without having the cost data that it had previously identified as necessary to support any such conclusion.

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relaxed standard of review allowed the court of appeals to uphold a sweeping regime of rate regulation for most of the approximately 11,000 cable systems in the country. It woud seem an elemental principle of First Amendment law that, absent actual misconduct, those engaged in creating and distributing speech are entitled to determine the price to be charged for it, *see generally Riley v. National Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781 (1988), and, in fact, no system of rate regulation singling out the press has ever before been undertaken. Yet, this vast and novel system has been deemed constitutionally acceptable largely on the basis of a mix of theories and assumptions about possible misconduct.

The potential damaging effects on speech are both significant and obvious. This Court has made clear that cable systems are "entitled to the protection of the speech and press provisions of the First Amendment." *Turner*, 114 S. Ct. at 2456. *See Leathers v. Medlock*, 499 U.S. 439, 444 (1991); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986). Although Judge Randolph professed doubt about how "rules requiring cable operators to charge reasonable rates burden speech," Pet. App. 56a, that observation, like much of the rest of the decision below, simply assumes the answer to a critical question. What the government needs to prove—and, in our view, clearly has not proved—is that an order directing cable systems to cut their rates by 17% will typically result in "reasonable rates" and not, as a matter of fact, something less. This issue is not a matter of policy; it is, at bottom, a question of fact: it depends upon whether cable systems are, in fact, routinely exercising market power to charge more than competitive prices. If they are not, then the order to reduce rates is not simply cutting away excess profits, but limiting both the amount and quality of speech that the affected systems are able to provide to their subscribers.[18]

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[18] The Commission itself has recognized that overregulation of rates adversely affects speech, declaring in a subsequent order that its earlier rules had "provided inadequate incentives for systems to add channels." *Sixth Reconsideration* Tech. App. 12 (1994).

The proper standard of review is also a critical, even determinative, issue in numerous other First Amendment cases. *See, e.g., 44 Liquormart,* 39 F. 3d at 7. As we have noted, *see* page 16 *supra,* intermediate scrutiny now applies to regulation of conduct with an incidental effect on speech (*United States* v. *O'Brien*); to regulation of the time, place, and manner of speech (*Clark v. Community For Creative Non-Violence,* 468 U.S. 288 (1984)); to regulation of commercial speech (*Edenfield v. Fane*); and to content-neutral regulation of speech itself (*Turner*). If a broad range of activities involving speech is to receive appropriate protection, therefore, it is essential that heightened scrutiny mean just that: a closer testing of the grounds for government regulation than is usually given under the rational basis standard or the principles governing review of administrative orders, with the government required to establish, rather than hypothesize, the premises required to support rules affecting speech. Further review here is needed to assure that First Amendment rights will be adequately protected.[19]

II. THE DECISION BELOW APPLIES TOO LENIENT A STANDARD OF JUDICIAL REVIEW.

The court of appeals acknowledged that orders regulating cable television rates are subject to at least intermediate scrutiny under the First Amendment. Pet. App. 53a. That conclusion is plainly correct given the holding in *Turner Broadcasting* that laws "singl[ing] out the press, or certain elements thereof, for special treatment pose a particular danger of abuse by the State . . . and so are always subject to at least some degree of heightened First Amendment scrutiny." 114 S. Ct. at 2458 (internal quotes and citation omitted). But, having recognized the governing standard, the court failed to recognize what that standard actually means. By extending far too much

[19] Although we believe that the issues raised in this petition merit plenary review in their own right, it may be appropriate to hold the petition pending disposition of the issues presented in *44 Liquormart,* No. 94-1140.

deference to the government, the court wrongly relieved it of the burden to establish that the assertedly important government interest is, in fact, real and not based on "speculation" or "conjecture." *Edenfield v. Fane*, 113 S. Ct. at 1798-99; *Turner*, 114 S. Ct. at 2470 (plurality opinion); *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995). And the court likewise excused the government from demonstrating that the regulation, in its full breadth, is necessary to serve the claimed interests. *SUNY*, 492 U.S. at 480.

This impermissible easing of the burden can be readily seen by looking at the court of appeals' treatment of the central factual matters on which the scheme of regulation ultimately depends. At the heart of this case is a basic question: has the government justified its broad order requiring cable systems to reduce their rates on the basis of a 17 percent "competitive differential"? That figure is intended to represent the difference between actual rates and "competitive" rates, and because the regulations apply to virtually *every* cable system, the government must establish two critical facts: *first*, that virtually every cable system is charging more than competitive rates and, *second*, that the amount of the excess is approximately 17 percent. If either point is incorrect—*i.e.*, if the government is forcing systems to reduce rates *already* at a competitive level or compelling systems to bring rates *below* a competitive level—then it is doing more than simply restraining excessive profits: it is cutting away at protected speech itself.[20]

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[20] The court of appeals noted at several points that cable operators could elect to have their rates determined in "cost-of-service" proceedings, *see* Pet. App. 19a-20a, 56a, but, for good reason, it did not hold that the availability of that alternative would excuse an otherwise unconstitutional scheme. The Commission itself regards the benchmark rules as the "primary" method of regulation (FCC C.A. Br. at 67), and the court of appeals recognized that "a cost-of-service regulatory proceeding is expensive for the cable operator," so that option "will indeed remain a limited exception to the general rule." Pet. App. 22a. In any event, this Court has made clear that the government may not defend the use of "a surrogate

The problem for the government in this case is simple: *its own data* suggest that, in large part, *both* of these assumptions are wrong. With regard to whether there was pervasive monopoly pricing requiring a nationwide system of rate regulation, the available data showed that, during the period of deregulation, rates on a per-channel basis had increased *less* than the rate of inflation, indicating (as the House Committee seemed to recognize) that abuses were *not* widespread in the absence of mandatory controls. Then, on the question whether a "competitive differential" exists, data compiled by the Commission itself showed that, while systems with a direct cable competitor on average charge approximately 13 percent less than systems without such a competitor, the difference is much smaller after the initial period of competition, suggesting that (following some temporary price wars) the rates of competitive systems are not substantially lower. And, finally, the same data showed that large systems without competition from another cable operator charge *no more than* large systems with such competition, thus suggesting that other restraints on the rates of those systems are present. In light of these data, it was necessary for the court, when reviewing the Commission rules under heightened scrutiny, to do more than ask simply whether the government had a "plausible" theory to reconcile the data with its conclusions; it was obliged to exercise truly independent judgment in assessing the purported grounds for this extensive regulatory scheme.

The court, unfortunately, did not do anything of the sort. The opinion of Judge Randolph determined that the government has an important interest in "protecting consumers from monopoly prices charged by cable operators" (Pet. App. 53a)—a proposition that nobody quar-

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and imprecise formula" to restrict First Amendment rights on the ground that those affected may choose a burdensome alternative. *Riley v. National Fed'n of the Blind of N. Carolina*, 487 U.S. at 793-94 & n.8. It is thus impermissible to "requir[e] the speaker to prove 'reasonableness' case by case based upon what is at best a loose inference that the [rates] might be too high." *Id.* at 793.

rels with in the abstract—but it gave no independent examination whatever to the key question in dispute: whether a finding of pervasive monopoly pricing could be squared with the data before the Commission. Rather than assess the record as a whole, the court simply held that the Commission was entitled to rely on data in a 1989 GAO report, showing previous rate increases above the rate of inflation (though not on a per-channel basis), wholly ignoring the fact that the *Commission* had expressly found that data insufficient to support an assumption of widespread monopoly pricing. See page 5 *supra*. Even without heightened scrutiny, it would seem appropriate to explore the reasons for now relying on data previously deemed unreliable for this very purpose, but the court did not. *See State Farm*, 463 U.S. at 44 (requiring agency to explain change in position).

On the other two central questions, Judge Randolph simply relied on the discussion by Judge Ginsburg. Pet. App. 56a n.12. But it could not be clearer that Judge Ginsburg did *not* apply any sort of heightened scrutiny to these issues. To the contrary, his opinion set out the usual standard for review of administrative decisions: "whether the agency has 'examine[d] the relevant data and *articulate*[*d*] [. . .] *a "rational connection* between the facts found and the choice made.'" Pet. App. 7a (quoting *State Farm*, 463 U.S. at 43) (emphasis added)). Then, stressing that heightened scrutiny was no part of his analysis, the opinion defined an especially limited role for the court: "Because agency ratemaking is far from an exact science and involves 'policy determinations in which the agency is acknowledged to have expertise,' our review thereof *is particularly deferential.*" Pet. App. 7a (quoting *United States v. FCC*, 707 F.2d 610, 618 (D.C. Cir. 1983) (emphasis added)).

The subsequent discussion was fully in keeping with these deferential standards. With respect to the issue of rates for "overbuild" systems—almost the exclusive basis for the finding of a substantial "competitive differential"—the opinion rejected the notion that initial prices are

artificially low because of "price wars," *id.* at 13a-14a, crediting instead the "*hypothesis* that the diminution in the competitive differential over time *could* be due to the emergence of 'parallel or coordinated pricing.' " Pet. App. 14a. Judge Ginsburg proclaimed that this "hypothesis"—which the Commission itself put forward as no more than one of two "scenarios" that are "equally consistent" with the data (*Fourth Report* ¶¶ 99, 101 [JA 915]; *see also id.* Tech. App. 4301 [JA 1052] ("one possible explanation"))—"cannot be proven without additional data," Pet. App. 14a, but excused the Commission from obtaining that readily available data on the ground that a theory of ratemaking " 'is not subject to the same substantiation principle as the substantial evidence test applicable to fact finding.' " Pet. App. 14a-15a (quoting *National Ass'n of Greeting Card Publishers v. United States Postal Service*, 607 F.2d 392, 401 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980), quoting *Continental Airlines v. CAB*, 551 F.2d 1293, 1301 (D.C. Cir. 1977)). The court thus concluded that the decision to rely on this hypothesis was not "arbitrary and capricious," stating: "[t]he Commission's theory is not so implausible that reliance upon it is unreasonable, especially when one considers that there is no evidence in the record, either anecdotal or analytical, to provide empirical support for the cable companies' price war hypothesis." Pet. App. 15a.[21]

It would seem an understatement to say that, as a substitute for heightened scrutiny, this analysis is wholly inadequate. To put it plainly, neither the Commission nor

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[21] Though unnecessary to our point here, we note that there *is* evidence to support the "price war hypothesis." The House Committee in 1992 referred to evidence of "greenmail" by overbuild entrants. *House Report* 45. The FCC in 1990 had concluded that it was "not clear" whether overbuild-system rates are equilibrium rates. *1990 Report* ¶ 67, 5 FCC Rcd 4962, 5002 (1990). And the Commission in its *Second Report and Order* (¶ 131; JA 831-32) and in its *Fourth Report and Order* (¶¶ 98-99; JA 914-15) cited to comments attesting to the reality of "price wars." *See, e.g.*, NCTA Comments at 18-19 (Jan. 27, 1993); NCTA Petition for Reconsideration at 11-12 (June 21, 1993).

the court below has any real idea why the competitive differential declines over time. It might be (as the Commission says) that the later prices are artificially high; or it may be (as we say) that the initial prices are artificially low. But the answer is crucial. If the latter explanation is the correct one, then the entire basis of the 17 percent rollback is unsound: the true rates of competitive cable systems are *not* substantially lower than the rates of other cable systems, but only during a temporary period of price cutting at the inception of competition. Yet, by virtue of the highly deferential form of review, the Commission was freed from any obligation to secure the data—essentially cost data for a relatively small number of systems—that could answer the question one way or the other.

The treatment of the relevant data for large cable systems is no better. The Commission has acknowledged that, even by its own methodology, there is *no* competitive differential at all for cable systems with more than 5,000 subscribers: that is, large systems not facing effective competition (as defined in the Act) charge no more than large systems that do face effective competition. But, in the face of that data, the Commission has nevertheless insisted that large cable systems reduce their rates by the standard 17 percent, and the court of appeals, again utilizing the wrong standard, held that its action was not "arbitrary and capricious." Pet. App. 17a.

The decision by the court below (per Judge Ginsburg) rested on two grounds, both of them insufficient under the proper First Amendment standard. First, it concluded that *the cable systems* had not offered a convincing explanation for what the data on their face showed: that large cable systems either do not have, or do not exercise, market power in their communities. Pet. App. 17a. This analysis again gets matters turned around: heightened scrutiny, properly applied, requires *the government* to demonstrate the existence of a genuine problem justifying the regulation at issue. *See Turner*, 114 S. Ct. at 2470 (plurality opinion). Second, the court noted that

the Commission, faced with the evidence showing no competitive differential for large systems, had conducted additional analyses and "[t]he results lent no support to the cable companies' contention that large systems without the constraint imposed by 'effective competition' charge rates nearer to the competitive level than do small systems." Pet. App. 18a.[22] All that means, however, is that the Commission *does not know*, one way or the other, whether large systems are charging more than competitive rates: it has data showing that they do not and analysis suggesting that they may. That state of ignorance cannot justify a sweeping order that could sharply affect the speech to be provided by those cable systems serving most viewers throughout the Nation.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[22] There are in fact good reasons to expect larger cable systems to have greater incentives to keep prices lower: they are in larger markets with more competition for viewers' time and dollars for information and entertainment; and they offer a wider array of remunerative services (*e.g.*, enhanced, premium, pay-per-view, home shopping) that depend vitally on levels of subscription, encouraging operators to increase subscriptions by lower pricing.